United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

604

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 22215

ALBERTA STROUD, Appellant

v.

UNITED STATES OF AMERICA, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

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(Crim. No. 1596-67)

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ISSUES PRESENTED

1. Did the Government sustain its burden of proving beyond a reasonable doubt that appellant was not acting in self-defense when she struck the blow that caused the decedent's death?

2. Did the court commit plain error when it included an Allen charge in its general charge to the jury before the jury retired to deliberate, particularly when:

(a) neither counsel had requested such an instruction, and

(b) appellant's counsel, at an earlier trial which had ended in a mistrial because the jury was unable to agree, had objected to the giving of an Allen charge?

This case has not previously been before the Court.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22215

ALBERTA STROUD, Appellant

v.

UNITED STATES OF AMERICA, Appellee

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

Alberta Stroud was charged with murder in the second degree in a one-count indictment filed December 28, 1967. She went to trial before Judge Gesell and a jury in the District Court on April 30, 1968, but on May 2 the court declared a mistrial when the jury reported that it was unable to agree upon a verdict. A second trial on May 16 and 17 resulted in a verdict of guilty of manslaughter as a lesser included offense.[1/] By judgment and commitment filed July 10, 1968, she was sentenced to imprisonment for two to ten years. This appeal followed.

1/ The transcript of the second trial, the one with which this appeal is concerned, consists of two volumes not consecutively paginated. They will be identified herein as "I Tr." and "II Tr.," denoting the volumes for May 16 and 17, respectively. The transcript of the earlier proceeding on April 30 and May 1 and 2, which terminated in a mistrial, will be cited herein as "Mistr."

The evidence at trial[2] showed that on Friday, October 13, 1967, the decedent, James L. Thomas, received a single stab wound at the hands of appellant and died from loss of blood. Police Officer James W. Porter testified that he found the decedent inside the premises 610 N Street, N.W., "lying face down . . . in a pool of blood" (I Tr. 83). Dr. William J. Brownlee,[3] deputy coroner for the District of Columbia, testified that at the time of the autopsy on October 14 the decedent's clothing was "severely stained" and some of it was "blood soaked" and that there was considerable blood encrusted on the unclothed portions of the decedent's body (I Tr. 52). Dr. Brownlee found one wound, one inch in length (I Tr. 64) and two and one-half to three inches in depth (I Tr. 56), on the posterior surface of the neck on the right-hand side (I Tr. 53). The doctor characterized it as a "stab wound" as distinguished from a "slash wound" (I Tr. 63-64). The wound went through a large muscle and penetrated the carotid artery and the internal jugular vein. Blood from these two vessels flowed out copiously through the wound. The doctor testified that in his opinion the decedent's death was caused by a massive external hemorrhage secondary to the stab wound in the neck (I Tr. 54-56).

On cross-examination Dr. Brownlee was asked a series of hypothetical questions concerning the manner in which the wound was inflicted.[4] He testified:

2/ Discussions of the "evidence" in this brief, of course, refer to the evidence adduced at the second trial only unless otherwise indicated. References to the testimony at the first trial will be explicit.

3/ Dr. Brownlee's name, although spelled correctly in the transcript of the first trial (e.g., Mistr. 53), is misspelled as "Brownley" in the transcript of the second trial (e.g., I Tr. 50-51).

4/ The doctor testified at the first trial that the wound was "basically on a horizontal plane" with a "very light inclination" (Mistr. 57-58). At the second trial no testimony was elicited on this point.

Q. . . . Doctor, as I am facing you, assuming that I am right handed, can you tell me how I would inflict a wound with a knife on the posterior side of the right side of the neck, posterior view of the right side of the neck?

A. I presume ---

Q. I am wielding a knife, how would I stab you on the right rear --- is that about right, sir, where I am pointing? I would have to wrap my arm around you, would I not?

A. Or you could come like this, or you could go around like that or you could use your left hand.

Q. Or you could turn and be stabbed; you could turn to the left and be stabbed? If you were to turn to your left could you be stabbed?

A. From any position about the body you can inflict this wound.

Q. But, if you didn't turn, I would have to wrap my arm around your neck to stab you, correct?

A. Or you could go beyond and come back, back over your shoulder. . . . You can go over my right shoulder and come back.
(I Tr. 62-63)

Conflicting testimony was adduced by the Government concerning the circumstances of the stabbing. Brenda Bailey testified that in the afternoon of October 13 she was in front of 1251 6½ Street, N.W., with an unidentified girl friend and a man when she heard someone exclaim that there was a fight in the alley. Miss Bailey and her girl friend went to the alley and saw a group of people, among whom were appellant and the decedent engaged in an argument, the decedent "standing with his back to the wall" and appellant "standing in front of him asking him why did he cut her" (I Tr. 21). Miss Bailey observed that appellant at the time was bleeding from her face and hands (I Tr. 26-27). A woman named Almeda Wright told a man in the group to give appellant a knife, and the man did so. Appellant then went toward the decedent, stating as she approached that she was going to cut him. She swung at him twice and missed, but on the third swing Miss Bailey "saw blood gush from behind his head." The

decedent moved to the side and said, "Go ahead and cut me," and then withdrew from the scene and "stumbled" into his house. Appellant also left and was aided by a woman who gave her a towel and advised her to go to a hospital, to which appellant replied, "I am not going to the hospital, I am going back around there and get . . . another piece of his ass"[5/] (I Tr. 21-22). Miss Bailey did not see the decedent Thomas cut appellant (I Tr. 30). According to her testimony, when she saw him "he was holding his hands in front of his face. A couple of times he tried to get away from the building where he was standing and she was pushing him back again against the building" (I Tr. 24).

Testifying somewhat along the same lines was Janice Butler, who stated that on October 13 she was visiting her aunt at 1242 6½ Street, N.W., when she heard someone say that there was a fight going on in the alley. She went to see what was happening, and when she arrived she saw appellant standing with a knife in her hand.[6/] Appellant had been cut in the face (I Tr. 40). Miss Butler also saw Thomas, who had been "stabbed in the throat somewhere, somewhere on the left side and he was bleeding real bad"(I Tr. 41). He "staggered" into his house, and someone else closed the door behind him. Miss Butler testified that she saw Thomas both before and after he was cut but did not see anyone cut him (I Tr. 42). She saw no knife in Thomas' hand[7/] (I Tr. 45). Appellant also left the scene and "went over towards Miss Rose's house . . . ." Miss Rose recommended that appellant go to the hospital, but according to Miss Butler appellant made the same statement quoted by Miss Bailey (I Tr. 44).

5/ Miss Bailey gave no testimony as to whether or not appellant returned to the scene after making this statement.

6/ The knife, a paring knife, was later recovered by the police from the pocket of appellant's coat and was introduced in evidence (I Tr. 48-49, 83-84).

7/ Although it was undisputed that the decedent cut appellant before she stabbed him, the knife used by the decedent was never produced or offered in evidence at trial.

Rosalie Austin first saw appellant on the afternoon of October 13 when appellant came to Miss Austin's home at 1246 6½ Street, N.W. Appellant at that time was "bleeding very badly" from cuts on her face and arm. When Miss Austin asked her what had happened and invited her inside, appellant replied, "I can't come in; I am bleeding too bad. A man cut me and I cut him back. . . . Give me a towel." Miss Austin did so, and appellant walked away toward an adjacent barber shop. Miss Austin called an ambulance, then brought a chair for appellant to sit on and waited with her in front of the barber shop until the ambulance came[8/] (I Tr. 34). Miss Austin gave no testimony concerning the incident in the alley, but she did state that appellant did not return to the alley in question after coming to her house (I Tr. 35).

Almeda Wright was the only Government witness besides Miss Bailey who provided testimony as to the actual stabbing, and the testimony of the two was in sharp conflict. Mrs. Wright stated that she, appellant and the decedent had been sitting in the alley, "talking and drinking," on the afternoon of October 13 (I Tr. 66). Appellant sent Mrs. Wright on an errand to get a bottle of wine. When she returned with the bottle, she sat down on the cement stoop at the rear of her house at 1234 Sixth Street, N.W. She and appellant began to play with the bottle, passing it back and forth and not letting Thomas have it. Thomas left and went to his house, and when he came back a few moments later he had a knife in one hand and a "stick" in the other.[9/] He approached appellant, whose back was toward him, and when she turned he cut her on the side of the face and then on the hand. She turned to leave, and Thomas "went to go at

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8/ Officer Porter testified that when he first arrived on the scene he found another officer administering first aid to appellant (I Tr. 82).

9/ Mrs. Wright testified at the first trial that the "stick" was about the size of a baseball bat (Mistr. 19). Its dimensions were not established at the second trial.

her again . . . ." Mrs. Wright cried, "Look out!" (I Tr. 68). She saw Thomas cut appellant in the back (I Tr. 71), whereupon appellant turned and stabbed him once with a paring knife which she had in her hand[10/] (I Tr. 69). The decedent returned to his house, and appellant went to the home of Rose Austin and did not come back to the alley[11/] (I Tr. 69-70).

Appellant's testimony in her own behalf was substantially the same as that of Mrs. Wright. Appellant briefly described the incident with the wine bottle, Thomas' departure and return with a knife and a stick. She stated that Mrs. Wright finally gave him the wine, at which time appellant started to leave the alley. She heard Mrs. Wright say, "Watch out," and when she turned around Thomas cut her on her face and left arm. She started again to leave; Mrs. Wright cried out again, and Thomas cut appellant on the back of the neck. Appellant, remembering that she had a knife in her pocket,[12/] turned and swung at him once. She did not know whether or not she hit him. At the time she was cut in the back she was trying to escape to Rose Austin's house to get a towel and try to stop the bleeding on her face (II Tr. 8-9, 12-13). She identified the coat she had been wearing, pointing out the place where it was cut by the decedent (II Tr. 11), and stated that at the moment when she took the knife from her pocket she was "afraid of my life. The man had cut me three times and he was still coming after me with the knife" (II Tr. 12). She finally made it to Rose's house, and Rose gave her a towel and waited with her until the ambu-

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10/ Mrs. Wright "did not notice" whether appellant had the knife in her left or her right hand (I Tr. 76).

11/ According to Mrs. Wright, at the moment of the stabbing there was no one in the alley but herself, appellant and Thomas (I Tr. 77). At that time Thomas was in front of a shed, which was within arm's length (I Tr. 76. When stabbed by appellant he was looking straight at her.

12/ Appellant testified that she had found the knife in the alley earlier that day and had picked it up because of a superstition that "if you see something with a sharp point pointing towards you, it was good luck" (II Tr. 9).

lance came. The ambulance took her to D.C. General Hospital, where she was treated for her injuries and remained overnight (II Tr. 9-10, 13-14). On cross-examination appellant stated that when she stabbed Thomas he was coming toward her "with the knife drawed back" and that she had held her own knife in her right hand (II Tr. 14-15). She confirmed Mrs. Wright's testimony that only the three of them were present when the stabbing occurred (II Tr. 17). According to appellant's testimony, the shed mentioned by Mrs. Wright was not behind Thomas but beside him "just like the jury box is on my side" (II Tr. 20). Although she had seen Thomas three or four times previously (II Tr. 19), she did not know him and had never spoken to him before that day (II Tr. 22). On the afternoon of October 13 he was drunk[13/] (II Tr. 26); appellant herself had also had a drink of wine from a paper cup (II Tr. 16, 26-29).

The court instructed the jury on the elements of second-degree murder and manslaughter and on the law of self-defense. Both counsel expressed satisfaction with the court's charge (II Tr. 71). The jury retired shortly before 12:30 p.m., took time out for luncheon, and at 2:30 p.m. returned its verdict (II Tr. 72-73).

13/ Miss Bailey testified that she observed that Thomas "had been drinking quite a bit, but he was still standing" (I Tr. 28). Dr. Brownlee had found Thomas' blood alcohol level to be 0.27 percent, remarking that "legal intoxication" set in at 0.15 percent. The doctor stated, "I would dare say that the majority of people with a level of 0.27 would be considered by most other people as being drunk" (I Tr. 58-59).

SUMMARY OF ARGUMENT

Where there is evidence of self-defense in a homicide case, the Government must prove beyond a reasonable doubt that the accused did not act in self-defense in committing the homicide. If the Government does not sustain this burden, the accused is entitled to an acquittal. Of the two eyewitnesses to the stabbing who testified for the Government, one strongly supported appellant's self-defense claim. The testimony of the other, Brenda Bailey, when carefully examined, shows only that appellant was in a situation in which a reasonable person would have been in fear of death or great bodily harm, and that appellant reacted to that fear in a manner which was reasonably justifiable. The Government's proof having thus failed to overcome the evidence of self-defense, she was entitled to a judgment of acquittal.

In the circumstances of this case, the giving of an Allen charge was plain error. Although this Court has repeatedly upheld the use of the Allen charge in cases where its use was appropriate, the Court has been careful to point out that the charge is potentially coercive and its content and manner of use deserve scrutiny. Since in the case at bar it was read to the jury before the jury even retired to deliberate, its obvious result was to suppress dissenting views ab initio in violation of appellant's right to a fair trial. The trial court in plain language was admonishing the jurors that they had better reach a unanimous verdict even though they in fact might not be unanimous. Such an admonition was manifestly prejudicial to appellant and necessitates reversal of his conviction.

ARGUMENT

1. The evidence was insufficient to sustain appellant's conviction of manslaughter, in that the Government failed to prove beyond a reasonable doubt that appellant did not act in self-defense.

(I Tr. 20-84, II Tr. 3-30)

When there is evidence in a homicide (or assault) case tending to show that the accused acted in self-defense, the defense does not have the burden of proof on this issue. If the evidence in its totality raises a reasonable doubt as to the defendant's guilt, he is entitled to an acquittal. He is not obliged to establish self-defense beyond a reasonable doubt, or even by a preponderance of the evidence. The prosecution must prove guilt beyond a reasonable doubt. Kelly v. United States, 124 U.S. App. D.C. 44, 361 F.2d 61 (1966); Meadows v. United States, 65 App. D.C. 275, 82 F.2d 881 (1936); De Groot v. United States, 78 F.2d 244 (9th Cir. 1935); Frank v. United States, 42 F.2d 623 (9th Cir. 1930); cf. Davis v. United States, 160 U.S. 469 (1895), cited in Frank and De Groot, supra.

The only eyewitness testimony concerning the actual stabbing of James Thomas came from Brenda Bailey, Almeda Wright and appellant herself.[14/] The testimony of the latter two was to the effect that appellant had acted in self-defense. If her conviction is to be upheld, support for it can come only from the testimony of Brenda Bailey. Appellant submits that Miss Bailey's testimony, when considered even in the light most favorable to the Government[15/] in combination with all the other evidence, was not sufficient to overcome the

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14/ The testimony of Janice Butler is merely frosting on Miss Bailey's cake. Miss Butler did not see anyone cut anyone. She did see the decedent both before and after he was stabbed, but she did not testify at all as to the circumstances immediately surrounding the stabbing.

15/ Crawford v. United States, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967); Curley v. United States, 81 U.S. App. D.C. 389, 160 F.2d 229, cert. denied, 331 U.S. 837 (1947).

contrary testimony of the other two witnesses and establish beyond a reasonable doubt that appellant did not stab Thomas in self-defense.

When Brenda Bailey arrived at the scene of the altercation, she first observed appellant and the decedent standing face to face. Appellant had already been cut twice and was bleeding severely. Miss Bailey heard appellant ask Thomas "why did he cut her" but gave no testimony concerning his reply, if any. Appellant then approached Thomas, knife in hand, and endeavored to cut him, succeeding on the third try. Both combatants then withdrew from the scene.[16] In the circumstances of the case this evidence can sustain appellant's conviction only on the theory that there was sufficient opportunity for detached reflection[17] so as to negate appellant's asserted fear for her life. Appellant submits that any reasonable person, newly wounded and in pain, surrounded by a crowd of strangers[18] in an unfamiliar neighborhood, confronted by an intoxicated assailant with a knife in his hand, would reasonably and necessarily have been in fear of death or great bodily harm. Her reaction to that emotional stimulus, even as described by Miss Bailey, clearly falls within

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16/ What happened afterwards is of no legal consequence. In particular, appellant's remark to Rose Austin (I Tr. 22, 44) about her intention to wreak further injury on a portion of Thomas' anatomy is without probative value on the issue of self-defense (i.e., whether appellant acted in reasonable fear of death or great bodily harm), particularly in view of the fact that she made no effort to carry out her stated intention.

17/ The Government offered no evidence as to the duration of the altercation in the alley. Miss Bailey was significantly unable to give an estimate:

> Q. From the time you first got in the alley until the time you saw a knife in Miss Stroud's hand, how long had you been in the alley?
>
> A. I had been there long enough to see everything that went on.
>
> Q. Can you tell the jury how many minutes you had been there at that point?
>
> A. No, I don't know. All I know is I seen it. (I Tr. 23)

No other Government witness was questioned on the point.

18/ Under Crawford and Curley, supra, the evidence that there were eight or nine people in the alley (I Tr. 31) must be accepted. If only the three participants were present, as appellant and Mrs. Wright testified, then Miss Bailey, being absent, could not have seen anything, and her entire testimony would have to be discarded.

the leeway defined by this Court in Inge v. United States, 123 U.S. App. D.C. 6, 356 F.2d 345 (1966);

> (T)he claim of self-defense is not necessarily defeated if, for example, more knife blows than would have seemed necessary in cold blood may be actually and reasonably entertained in the heat of passion. "(I)f the last shot was intentional and may seem to have been unnecessary when considered in cold blood, the defendant would not necessarily lose his immunity if it followed close upon the others while the heat of the conflict was on, and if the defendant believed that he was fighting for his life." 123 U.S. App. D.C. at 9, 356 F.2d at 348, quoting from Brown v. United States, 256 U.S. 335, 344 (1921).

Miss Bailey's testimony, not only as to the number of knife-thrusts but as to appellant's entire conduct prior to her departure from the alley, depicted a woman reacting to great fear in a manner justified by that fear. "Detached reflection cannot be demanded in the presence of an uplifted knife." Brown v. United States, supra at 343.[19/] Appellant submits that Miss Bailey's testimony was legally insufficient to overcome all the other evidence tending to show self-defense. It follows that the Government did not prove appellant's guilt beyond a reasonable doubt, and her motion for judgment of acquittal should have been granted. Her conviction now must accordingly be reversed.

19/ Since appellant had already been cut twice, it should make no difference whether or not the knife was actually uplifted in the approaching decedent's hand, as appellant stated (II Tr. 15). Although Miss Bailey said that she saw nothing in the decedent's hand (I Tr. 24), her testimony does not affirmatively establish that his knife had in fact been put away.

2. The court committed plain error in giving an Allen charge when none was requested, particularly when appellant's counsel had objected to an Allen charge at the first trial.

(II Tr. 69-71, Mistr. 126-128, 143)

Near the end of its charge to the jury, the trial court sua sponte included an instruction in the nature of an Allen charge. The court stated:

> Your verdict in this case, ladies and gentlemen, must be the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto and your verdict must be unanimous. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement.
>
> Although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusions of your fellows, you should examine the questions submitted with candor and with proper regard and deference to the opinions of the others. You should listen to each other's arguments with a disposition to be convinced.
>
> If much the larger number of jurors are for conviction, a dissenting juror should consider carefully whether his doubt is a reasonable one when it makes no impression on the minds of so many jurors equally honest, equally intelligent with himself.
>
> If, upon the other hand, a majority are for acquittal, the minority ought to ask themselves and carefully consider whether they might not reasonably doubt the correctness of their judgment which is not concurred in by the majority.
>
> Do not hesitate to change an opinion when convinced it is erroneous. Or do not surrender your honest conviction as to the weight or effect of the evidence for the mere purpose of returning a verdict.
>
> (II Tr. 69-71)

The central portion of this passage is taken from the standard Allen charge, which in turn derives from the summary by the Supreme Court of the charge to which it gave its approval in Allen v. United States, 164 U.S. 492, 501 (1896). See Moore v. United States, 120 U.S. App. D.C. 203, 345 F.2d 97 (1965); Junior Bar Section of D.C. Bar Ass'n, Criminal Jury Instructions No. 41 (1966). Although this Court has repeatedly upheld the use of the Allen charge, most

recently in Fulwood v. United States, 125 U.S. App. D.C. 183, 369 F.2d 960 (1966), it has also stated that "since the charge is potentially coercive, its content and manner of use deserve scrutiny." Moore v. United States, supra at 204, 345 F.2d at 98. Appellant submits that the circumstances under which the Allen charge was given in the case at bar amounted to plain error under Rule 52 (b), F.R. Crim. P., requiring reversal of appellant's conviction.

The Allen charge is customarily given when the jury reports to the trial court, after having deliberated for some period of time, that it is unable to agree on a verdict. In such a context the Allen charge is usually appropriate. In the context of the instant case, however, appellant submits that the trial court had no justification for giving an Allen charge. The jury had not even retired to deliberate, and thus there was of course no report of disagreement. Neither counsel had requested that such an instruction be given, nor had the court discussed the matter at all with counsel at this trial.[20/] There was substantial conflict in the testimony, even among the Government's own witnesses. Yet the jury, having been instructed by the court in language "intended to 'encourage' jurors to agree," Campbell v. United States, 115 U.S. App. D.C. 30, 30 n.1, 316 F.2d 681, 681 n.1 (1963), returned a guilty verdict in two hours, more or less, with time out for lunch.

The coercive nature of the Allen charge has often been acknowledged by the courts. E.g., Moore v. United States, supra; Campbell v. United States, supra; Green v. United States, 309 F.2d 852 (5th Cir. 1962). This Court noted in Fulwood, supra, that the Allen charge, when given substantially in the language of the Allen case, "is a carefully balanced method of reminding jurors of their elementary obligations . . . ." When read together, however, Fulwood and Moore clearly indicate that any loss of balance can be impermissibly

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20/ See footnote 21, infra.

coercive. See also Jenkins v. United States, 380 U.S. 445 (1965), reversing 117 U.S. App. D.C. 346, 330 F.2d 220 (1964).

Appellant maintains that the use of the Allen charge should be restricted to situations where it is applicable and, more importantly, that its inclusion in the general charge of the court before the jury even begins its deliberations should be held to be reversible error.[21/] The concededly coercive language of Allen has no place in the general charge, for it is manifestly designed to stifle dissent. When it is given to the jury before any dissenting jurors have an opportunity to air their views, the obvious result is to suppress those views in derogation of a defendant's right to a fair trial by an impartial jury. In the instant case the unsolicited Allen charge in effect served as an admonition to the jurors that they had better reach a unanimous verdict even though they might not be in fact unanimous. That the members of the jury followed the court's admonition is shown by the brevity of their deliberations and the speed with which they returned their verdict. Under all the circumstances, appellant submits that the giving of the Allen charge was plain error affecting substantial rights.

21/ It should be borne in mind that at the first trial appellant's counsel had vigorously objected to the giving of an Allen charge when it first appeared that the jury might not be able to agree (Mistr. 126-128), and the court in deference to counsel's wishes gave no supplemental Allen charge (Mistr. 143). Appellant of course does not suggest that a busy trial judge should be obliged to remember everything that went on in a trial that took place more than two weeks past. The trial court is certainly not to be faulted for neglecting to recall this detail of the prior proceeding. Appellant's position is simply that the Allen charge has no place in the average trial and should not be routinely given, notwithstanding that a portion of it was included among the trial court's original instructions in the Fulwood case without adverse comment from this Court. The Allen charge should be confined to Allen-type cases---i.e., cases in which the jury reports to the court that it is in disagreement. Its use in other situations is inherently coercive.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be reversed.

JOHN A. TERRY
Counsel for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was personally delivered to the Office of the United States Attorney, Room 3600, United States Court House, Washington, D.C., this ~~21st~~ 1st day of ~~March~~ April 1969.

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ISSUES PRESENTED *

In the opinion of the appellee, the following issues are presented:

1) Whether there was sufficient evidence produced at trial for a reasonable man to fairly conclude guilt beyond a reasonable doubt.

2) Whether the trial court's instructions in the nature of an *Allen* charge were impermissibly coercive in the circumstances of this case.

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,215

ALBERTA STROUD, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Alberta Stroud pleaded not guilty to a one-count indictment, charging murder in the second degree. She was tried on April 30, 1968, but a mistrial was declared when the jury reported that it was unable to agree upon a verdict. A second jury trial was held on May 16-17, 1968, and appellant was found guilty of manslaughter as a lesser included offense. She was subsequently sentenced to imprisonment for a period of two to ten years.

The relevant facts show that at about 4:00 p.m. on the afternoon of Friday, October 13, 1967, the appellant was

present in an alley between 6½ and 6th Streets, off N Street, Northwest, District of Columbia. She was in the company of Almeda Virginia Wright and James Ledell Thomas (I Tr. 66; II Tr. 8).[1] All three had been drinking.[2] Mr. Thomas sent Mrs. Wright to a liquor store to buy a bottle of wine. When Mrs. Wright returned, she and the appellant began passing the bottle back and forth in front of Mr. Thomas who became angered by their reluctance to surrender his wine (I Tr. 67; II Tr. 8).

Mr. Thomas left the alley and went to his house, returning shortly thereafter with a knife in one hand and a stick in the other. The appellant remained in the alley although she saw that Mr. Thomas was carrying the weapons (II Tr. 26) Mr. Thomas then attacked the appellant, cutting her on the face, hand and back[3] (I Tr. 67-68 and 71; II Tr. 8-9).

The appellant stabbed and killed Mr. Thomas in the alley with a knife.[4] The record is in conflict regarding the circumstances of the killing. The appellant testified that she stabbed Mr. Thomas in self-defense, as ". . . he was coming toward me with the knife drawed back. . ." (II Tr. 15), as she ". . . started to leave the alley. . ." (II Tr. 12) and after he had cut her three times (II Tr. 11-12). Mrs. Wright generally corroborated the testimony of appellant (I Tr. 67-80).

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[1] The transcript of the second trial which resulted in conviction is in two volumes not consecutively paginated. As in the Brief For Appellant, the first volume is identified herein as "I Tr.", and the second volume is referred to as "II Tr.".

[2] The appellant and Mrs. Wright had consumed only ". . . a cup of wine . . ." that afternoon (I Tr. 69; II Tr. 16). Mr. Thomas had consumed enough to raise his blood alcohol level to 0.27 per cent. A blood alcohol level of 0.15 is the legal measure of intoxication (I Tr. 58). The appellant testified that she ". . . knew . . . [Mr. Thomas] was drunk . . ." (II Tr. 26).

[3] Sometime prior to the attack by Mr. Thomas, Mrs. Wright swung a stick at Mr. Thomas (I Tr. 78; II Tr. 19).

[4] The appellant testified that she had found this knife in the alley a few hours earlier in the day and had placed it in her pocket. (II Tr. 9).

Other witnesses refuted the appellant's claim of self-defense. Brenda Bailey, the Government's major witness, testified that she was not present to see Mr. Thomas cut appellant, but that when she arrived at the alley,

> [Mr. Thomas] ". . . was standing with his back to the wall and she [appellant] was standing in front of him asking him why did he cut her. And then Almeda [Mrs. Wright] told a man in the group to give Alberta [appellant] a knife so she could cut the man who had cut her. The fellow handed her a knife. . . She was saying she was going to cut him and then I saw her [appellant] swing at him two times with the knife. The first two times I didn't see no blood but the third time I saw blood gush from behind his [Mr. Thomas'] head . . ." (I Tr. 21-22).[5]

Miss Bailey also testified that prior to the time Mr. Thomas was stabbed, ". . . He was holding his hands in front of his face. A couple of times he tried to get away . . . and she [appellant] was pushing him back again against the building. . ." (I Tr. 24). She did not see a knife in Mr. Thomas' hand (I Tr. 24).

Janice Butler, another Government witness, did not actually see the appellant stab Mr. Thomas (I Tr. 42). However, she did see the decedent shortly after the stabbing and testified that she did not see a knife in his hand as he stood in the alley fatally wounded (I Tr. 45). She also supported the testimony of Brenda Bailey in regard to another matter by stating that ". . . a group of people. . ." had gathered at the scene of the stabbing.[6] Finally, she stated that after the killing she heard the

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[5] The appellant and Mrs. Wright testified that appellant swung the knife at Mr. Thomas just once (I Tr. 74; II Tr. 9).

[6] Brenda Bailey estimated the number of people gathered at the scene to be ". . . eight or nine . . ." (I Tr. 31). Janice Butler stated there were ". . . about seven people . . ." (I Tr. 39). The appellant and Mrs. Wright testified there was no one in the alley except Mr. Thomas, the appellant and Mrs. Wright (I Tr. 72; II Tr. 28).

appellant say she ". . . was going back to get another piece of his [Mr. Thomas'] ass. . ." (I Tr. 44).[7]

After stabbing Mr. Thomas, the appellant went to the nearby home of Rosalie Austin (I Tr. 33-37). Shortly thereafter, Officers James Brumzos and James Porter of the Metropolitan Police Department arrived at the scene. Officer Brumzos treated the appellant and took from her the knife used to kill Mr. Thomas (I Tr. 46-49). Officer Porter discovered the body of Mr. Thomas a short distance from the scene of the stabbing (I Tr. 81-84).

On October 14, 1968, Dr. William Brownlee, Deputy Coroner for the District of Columbia, performed an autopsy on the body of Mr. Thomas. He testified that the decedent was 5 feet 5 inches in height, weighed 130 pounds and was about 66 years of age.[8] He stated that the cause of death was the single stab wound inflicted by appellant (I Tr. 50-64).

ARGUMENT

I. There was sufficient evidence produced at trial for a reasonable man to fairly conclude guilt beyond a reasonable doubt.

(I Tr. 20-32, I Tr. 37-46, I Tr. 50-64, I Tr. 67-80, II Tr. 11-15).

Appellant contends that there was insufficient evidence to support her conviction. In reviewing the sufficiency of the evidence, this Court "must assume the truth of the Government's evidence and give the Government the benefit of all legitimate inferences to be drawn therefrom." *Curley* v. *United States*, 81 U.S. App. D.C. 389, 392, 160 F. 2d 229, 232 *cert. denied*, 331 U.S. 837 (1947); *accord*, *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F. 2d 332 (1967); *Thomas* v. *United States*, 93 U.S. App. D.C. 392, 211 F. 2d 45, *cert. denied*, 347 U.S. 969 (1954).

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[7] This supports Brenda Bailey's account (I Tr. 22).

[8] Appellant is 46 years of age (II Tr. 6).

Conflicting evidence was produced at trial regarding the issue of self-defense. Appellant and Almeda Wright testified that appellant stabbed and killed James Thomas in self-defense. (II Tr. 11-15, I Tr. 67-80) However, Brenda Bailey testified that sometime after the attack upon the appellant had been completed, she viewed Mr. Thomas, unarmed and standing with his back to a wall, while the appellant stood in front of him and made some threatening remarks. Thereafter, she saw the appellant receive a knife from a bystander and stab Mr. Thomas who had placed his hands in front of his face and attempted to escape.[9] (I Tr. 20-32)

Janice Butler, though not a witness to the fatal stabbing, supported the testimony of Brenda Bailey in several respects, *i.e.*, she did not see a knife in Mr. Thomas' hand, and a group of people had gathered at the scene of the stabbing. (I Tr. 42-45).

After considering the conflicting evidence in this case, a reasonable man could properly conclude that in the circumstances of this fatal stabbing, the appellant was an aggressor and the deceased a passive victim.

II. The trial court's instructions in the nature of an *Allen* charge were not impermissibly coercive in the circumstances of this case.

(II Tr. 69-71, Mistr. 127-128, 143)[10]

In its charge to the jury, the trial court *sua sponte* included an instruction in the nature of an *Allen* charge.[11]

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[9] Brenda Bailey was unable to estimate the amount of time that elapsed from her entry into the alley until the fatal stabbing. (I Tr. 23) However, her testimony abundantly supports the conclusion that Mr. Thomas had withdrawn from the fray well before the appellant attacked and killed him, and that such withdrawal had been communicated to appellant. (I Tr. 20-23) See *Harris* v. *United States*, 124 U.S. App. D.C. 309, 364 F.2d 701 (1966); *Inge* v. *United States*, 123 U.S. App. D.C. 6, 356 F.2d 345 (1966).

[10] As in the Brief For Appellant, the transcript of the earlier proceeding on April 30 and May 1-2, 1968, which terminated in a mistrial is cited as "Mistr."

[11] *Allen* v. *United States*, 164 U.S. 492 (1896).

Appellant apparently concedes, and rightfully so, that the content of the instruction given was within the limits set by *Allen* and subsequent cases.[12] See *Kawakita* v. *United States*, 343 U.S. 717 (1952), *affirming* 190 F. 2d 506 (9th Cir., 1951); *Lias* v. *United States*, 284 U.S. 584 (1931), *affirming* 51 F. 2d 215 (4th Cir. 1930); *Fulwood* v. *United States*, 125 U.S. App. D.C. 183, 369 F. 2d 960 (1966); *Moore* v. *United States*, 120 U.S. App. D.C. 203, 345 F. 2d 97 (1965); *Junior Bar Section of D.C. Bar Ass'n, Criminal Jury Instructions* § 41 (1966). However, appellant contends, the fact that the charge was given before the jury began deliberations is cause for reversal.[13]

This Court has already reviewed a case in which the trial court included a portion of an *Allen* charge in its original instructions, and has found no error. *Fulwood*

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[12] The Court instructed: "Your verdict in this case, ladies and gentlemen, must be the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto and your verdict must be unanimous. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement. Although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusions of your fellows, you should examine the questions submitted with candor and with proper regard and deference to the opinions of the others. You should listen to each other's arguments with a disposition to be convinced. If much the larger number of jurors are for conviction, a dissenting juror should consider carefully whether his doubt is a reasonable one when it makes no impression on the minds of so many jurors equally honest, equally intelligent with himself. If, upon the other hand, a majority are for acquittal, the minority ought to ask themselves and carefully consider whether they might not reasonably doubt the correctness of their judgment which is not concurred in by the majority. Do not hesitate to change an opinion when convinced it is erroneous. Or do not surrender your honest conviction as to the weight or effect of the evidence for the mere purpose of returning a verdict." (II Tr. 69-71)

[13] Appellant also indicates some dissatisfaction over the Court's inclusion of the *Allen* charge without a request from the Government, and over an objection raised by appellant at the earlier mistrial. A trial court is, of course, free to issue instructions *sua sponte*. Rule 30, F.R. Crim. P. Appellant failed to object to the instruction at the trial resulting in conviction.

v. *United States*, 125 U.S. App. D.C. 183, 369 F. 2d 960 (1966). Further, the Government respectfully submits that the giving of an *Allen* charge before the jury indicates any inability to agree lessens, rather than heightens, the danger of jury coercion resulting therefrom. See *Breeze* v. *United States*, 398 F. 2d 178 (10th Cir. 1968); *Carter* v. *United States*, 333 F. 2d 354 (10th Cir. 1964) cited in *Burrup* v. *United States*, 371 F. 2d 556 (10th Cir.), *cert. denied*, 386 U.S. 1034 (1967); *Nick* v. *United States*, 122 F. 2d 660 (4th Cir.), *cert. denied*, 314 U.S. 687 (1941).

It is as true now as it was when *Allen* was decided that the function of the jury is to arrive at a verdict through deliberation, mutual concession, and due deference to the opinions of others. The *Allen* charge merely warns against dissent based solely upon pride and obstinence. The charge given below was uncoercive in nature, and was proper in the circumstances.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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